

STATEMENT OF THE CASE

ISSUES

Respondent contends it is entitled to the Social Security retirement offset pursuant to K.S.A. 2008 Supp. 44-501(h) under a strict construction of the statute. Respondent further contends that temporary total disability benefits paid to date should be credited against claimant's functional impairment and that respondent is entitled to a credit for retirement benefits claimant received under the Federal Social Security Act. Although respondent lists as an issue whether claimant is entitled to future medical benefits, in its brief to the Board, it acknowledges claimant's right to future medical benefits will remain open and asks the Board to enter an order as such, "leaving post-award medical issues to be dealt with pursuant to K.S.A. 44-510k."¹ During oral argument to the Board, the parties agreed that neither future medical nor ongoing medical treatment are issues for the Board to consider on appeal. Accordingly, the ALJ's orders as to medical treatment are affirmed.

Claimant argues that the Kansas Supreme Court, in *Dickens*,² held that a respondent is not entitled to an offset pursuant to K.S.A. 44-501(h) when the claimant was retired and collecting Social Security benefits before the date of a work-related accident. Accordingly, claimant asks the Board to affirm the ALJ's Award. In the event the Board reduces claimant's benefits, claimant argues the reduction in future benefits should be calculated on a week-for-week rather than on a dollar-for-dollar basis.

The issues for the Board's review are:

(1) Is respondent entitled to a Social Security retirement offset pursuant to K.S.A. 2008 Supp. 44-501(h)?

(2) If so, is respondent entitled to a full credit for temporary total disability benefits paid to date by deducting from the full amount ordered paid in the Award for claimant's functional impairment?

FINDINGS OF FACT

Claimant's date of birth was July 6, 1931. He turned 65 years old in 1996, at which time he began to collect Social Security retirement benefits. He began working for respondent in May 2001, when he was 70 years old. He was hit by a forklift at work on December 3, 2008, resulting in a broken hip and back injuries. The parties have stipulated that as a result of the work-related accident, claimant has a 33.5 percent functional disability to the body as a whole and he is permanently, totally disabled.

¹ Resp. Brief (filed Feb. 1, 2011) at 15.

² *Dickens v. Pizza Co., Inc.*, 266 Kan. 1066, 974 P.2d 601 (1999).

PRINCIPLES OF LAW

The Workers Compensation Act provides that a worker's disability compensation may be reduced or offset by Social Security retirement benefits. K.S.A. 2008 Supp. 44-501(h) provides:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

The Kansas Supreme Court, however, has considered that statute and has held that workers compensation benefits are not offset when the injured worker was receiving Social Security retirement benefits before the accident at work. The Kansas Supreme Court reasoned the offset was intended to prevent the duplication of wage loss replacement benefits, but there is no such duplication when the worker was injured after commencing receipt of the Social Security benefits. The court noted, in part:

When a retired person who works to supplement social security income suffers a second wage loss when injured in the course of employment, K.S.A. 1998 Supp. 44-501(h) does not apply.³

... "[T]he social security offset in K.S.A. [1998 Supp.] 44-501(h) is rationally related to the valid state interest of preventing the duplication of wage loss replacement benefits." [Quoting *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 870, 942 P.2d 591 (1997).]⁴

Boyd [v. *Barton Transfer & Storage*, 2 Kan. App. 2d, 425, 580 P.2d 1366, rev. denied 225 Kan. 843 (1978)], the case relied on by the ALJ, held that K.S.A. 1976 Supp. 44-510f(c) did not apply to a worker who had already retired, but was working to supplement his social security income. 2 Kan. App. 2d at 429. *Boyd* concluded "that the legislature did not intend K.S.A. 1976 Supp. 44-510f(c) to apply to plaintiff and those similarly situated, even though the literal wording of that provision might seem to include them." 2 Kan. App. 2d at 429. The *Boyd* court reasoned that a retired person who works to supplement social security income

³ *Dickens v. Pizza Co.*, 266 Kan. 1066, Syl. ¶ 2.

⁴ *Id.*, at 1069.

suffers a second wage loss when injured in the course of supplemental employment. 2 Kan. App. 2d at 428. Preventing compensation for a second wage loss was inconsistent with the intent of K.S.A. 1976 Supp. 44-510f(c) to avoid wage-loss duplication. There is no wage-loss duplication in the scenario of a worker injured after receiving social security benefits.⁵

Applying K.S.A. 1998 Supp. 44-501(h) to a retired worker receiving social security benefits would preclude replacement of wages which the legislature intended to provide under the Workers Compensation Act, K.S.A. 44-501 *et seq.*⁶

In *Bergstrom*,⁷ the Kansas Supreme Court stated:

When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.

A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.

ANALYSIS

There is no dispute that claimant was receiving social security retirement benefits before his December 2008 accident. There is no wage loss duplication by compensating claimant for that accident under the Workers Compensation Act. The Kansas Supreme Court has held that K.S.A. 2008 Supp. 44-501(h) does not apply. The Board will follow the Supreme Court precedent that directly interprets and applies the statute in question over the general language in *Bergstrom*. Consequently, neither temporary total disability, permanent partial disability, nor permanent total disability compensation are offset or reduced.

CONCLUSION

Claimant's Award is not offset or reduced by his social security retirement benefits. Respondent is not entitled to a credit against the temporary total disability or permanent total compensation paid or payable in this claim.

⁵ *Id.*

⁶ *Id.*, Syl. ¶ 3.

⁷ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶ 1, 2, 214 P.3d 676 (2009).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated December 30, 2010, is modified to correct the compensation rate but is otherwise affirmed.

Claimant is entitled to 46 weeks temporary total disability compensation at the rate of \$238.87 per week or \$10,988.02 followed by permanent total disability compensation at the rate of \$238.87 per week not to exceed \$125,000.00 for a permanent total general body disability.

As of April 18, 2011, there would be due and owing to the claimant 46 weeks of temporary total disability compensation at the rate of \$238.87 per week in the sum of \$10,988.02, plus 77.71 weeks of permanent total disability compensation at the rate of \$238.87 per week in the sum of \$18,562.59, for a total due and owing of \$29,550.61, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$95,449.39 shall be paid at \$238.87 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of April, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge